No. 82-1383

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM J. CINTOLO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction under 28 U.S.C. 1291 over an appeal by petitioner, an attorney, from an order disqualifying him from representing any witnesses in connection with a grand jury investigation of which petitioner himself is a target.

2. Whether the court of appeals properly denied petitioner's request under 28 U.S.C. 1651 for extraordinary relief from the disqualification order.

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OPINION BELOW

The judgment orders of the court of appeals (Pet. App. 1a, 2a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1983 (Pet. App. 1a, 2a). The petition for a writ of certiorari was filed on February 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 18, 1983, the United States filed a motion in the United States District Court for the District of Massachusetts for an order disqualifying petitioner, an attorney, from representing any witnesses before a grand jury that was investigating petitioner and others for possible violations of 18 U.S.C. (Supp. V) 1503 (obstruction of justice), 18 U.S.C. 1962 (RICO), and other federal statutes.

The motion to disqualify recited that the government had informed petitioner on or before September 10, 1982, that he was among the targets of the grand jury investigation. On November 5, 1982, after petitioner had represented one witness before the grand jury, counsel for the government informed petitioner that, in government counsel's view, petitioner had a clear conflict of interest in representing any additional grand jury witnesses and that the government would seek a disqualification order unless petitioner voluntarily refrained from such representation. In December 1982, witnesses Daw and Orlandella were subpoenaed to testify before the grand jury on January 27, 1983,[1] and petitioner informed counsel for the government that he intended to represent them. The government's disqualification motion further stated that petitioner was counsel for at least one other grand jury target, Gennaro Angiulo, and that witnesses were subpoenaed to provide evidence against Angiulo (Motion to Disqualify at 1-3).[2]

Based on these facts and additional facts contained in an *in camera* affidavit of government counsel detailing the evidence against petitioner and Angiulo,[3] the government asserted that petitioner should be disqualified for two principal reasons: (i) because, as a target of the investigation, petitioner had a personal interest in the matters under investigation that conflicted with the interests of the witnesses

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[1]The scheduled appearance date for witnesses Daw and Orlandella subsequently was postponed until February 3, 1983, to furnish them an opportunity to obtain other counsel.

[2]Copies of the government's motion to disqualify and other materials were filed with the Court by petitioner in connection with his application for a stay (No. A-660), which was denied by Justice Brennan on February 2, 1983.

[3]The Government's Motion for Leave to File Affidavit for In Camera Review explained that the evidence in the *in camera* affidavit was before the grand jury and constituted grand jury material that should not be disclosed publicly. *Id.* at 1, citing Fed. R. Crim. P. 6(e).

subpoenaed to testify about those matters; and (ii) because the interests of Angiulo and those of the other witnesses subpoenaed to testify against Angiulo were in direct conflict. The government contended that in light of petitioner's status as a target of a grand jury investigation into possible obstruction of justice through interference with grand jury witnesses and his representation of another target of that investigation (Angiulo), petitioner's representation of witnesses subpoenaed to testify in these matters might frustrate the public interest in an effective grand jury investigation (Motion to Disqualify at 2-3). The district court, after reviewing the materials and the *in camera* affidavit,[4] granted the motion to disqualify.

Petitioner appealed the disqualification order, but the court of appeals dismissed his appeal, holding that it did not have jurisdiction under 28 U.S.C. 1291 over an appeal from a pre-indictment order disqualifying an attorney. The court of appeals also denied petitioner's petition for a writ of mandamus or prohibition seeking to have the disqualification order set aside, concluding that the district court had not abused its discretion in disqualifying petitioner (Pet. App. 2a).

ARGUMENT

1. It must be beyond serious dispute that the district court acted properly in ordering the disqualification of petitioner from representing witnesses in connection with a grand jury investigation in which petitioner himself is a target. The personal interests of the attorney and those of

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[4]We lodged a copy of the *in camera* affidavit with the Clerk of this Court, under seal, in connection with the stay application mentioned in note 2, *supra*.

his witness/clients inherently conflict in such a case.[5] Petitioner contends (Pet. 11-22), however, that the court of appeals erred in dismissing his appeal from the disqualification order. This contention does not warrant review, especially in the circumstances of this case.

a. As an initial matter, we note that this is not a case in which the witness himself has taken an appeal to challenge the district court's order disqualifying his attorney. Petitioner sought review of the district court's order solely in his own name. Neither of the two witnesses subpoenaed to testify before the grand jury on February 3, 1983 or any other person whom petitioner is barred from representing is named as a party to the appeal. This is more than a matter of form.

If the witnesses had discharged petitioner of their own volition, petitioner would have been required to abide by that decision and would not be entitled to seek a court order reinstating him to his position as counsel for the witnesses. A court could not in this fashion force an attorney on a client who did not wish to have him. Cf. *Faretta* v. *California*, 422 U.S. 806, 820-821 (1975).[6]

Similarly, the client is sufficiently the master of his own case and his relationship with his attorney (see ABA *Code of Professional Responsibility* DR 2-110(B)(4), DR 7-101

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[5]ABA *Code of Professional Responsibility* DR 5-101(A) (1978); *United States* v. *Salinas*, 618 F.2d 1092, 1093 (5th Cir.), cert. denied, 449 U.S. 961 (1980); *In re Investigation Before February 1977, Lynchburg Grand Jury*, 563 F.2d 652, 656-657 (4th Cir. 1977); *United States* v. *Hobson*, 672 F.2d 825, 829 (11th Cir. 1982), cert. denied, No. 82-57 (Oct. 12, 1982).

[6]Cf. DR 2-110(B)(4) of the ABA *Code of Professional Responsibility*, which requires an attorney to withdraw from employment (with permission of the court if its rules so require) when he has been discharged by his client.

(1978)) that he may choose to acquiesce in or decline to seek appellate review of a judicial order requiring disqualification of his attorney or may elect to challenge that order by some other means, even if the attorney disagrees with his decision. In such a situation, we submit that the attorney could not countermand his client's wishes and invoke the judicial process in an effort to restore the attorney-client relationship. Thus, in the present case, it was the witnesses, not petitioner, who were the proper parties to seek appellate review of the district court's order disqualifying petitioner. Only if the clients themselves appeal can the appellate court be assured that a decision is sought at the behest of those whom the ethical rules are designed to protect, and not on the basis of pecuniary or other interests of the attorney (or those employing the attorney) that perhaps diverge from those of the client.Cf. *Wood* v. *Georgia*, 450 U.S. 261 (1981).

In this connection, we have been informed by the Special Attorney for the United States responsible for the case that Daw and Orlandella, the subpoenaed witnesses petitioner planned to represent, retained other counsel to represent them before the grand jury. Then, on February 3, 1983, the rescheduled date of their appearance before the grand jury, Daw and Orlandella filed in the district court motions to quash the subpoenaes and for other relief, and the government filed a motion to compel their testimony. The district court granted the government's motion and ordered the two witnesses to appear and testify on February 17, 1983. On February 15, 1983, Daw and Orlandella filed their own petition for writ of mandamus and prohibition in the court of appeals challenging, *inter alia*, the order disqualifying Cintolo. The court of appeals denied this extraordinary relief by memorandum and order dated March 2, 1983 (App., *infra*, 1a-3a). As of the date of this filing, Daw and Orlandella have not sought further review of the court of appeals' decision.

The court of appeals had held in *In re Benjamin*, 582 F.2d 121 (lst Cir. 1978), that a grand jury witness may challenge a disqualification order by refusing to testify and then challenging the disqualification order on appeal from a citation for contempt. We have been informed by the Special Attorney responsible for the case that Daw, represented by new counsel, did testify before the grand jury on February 17, 1983, and thus did not persist in his claimed right to be represented by petitioner before he would testify. The matter of the disqualification of petitioner as Daw's attorney therefore would appear to be moot. We also have been informed, however, that Orlandella refused to testify on the ground, *inter alia*, that she did not have the assistance of counsel of her choice, since petitioner was disqualified. Contempt proceedings in connection with Orlandella's refusal to testify have not yet been scheduled. If she is held in contempt, under the First Circuit's decision in *In re Benjamin*, she may challenge the disqualification order on an appeal from the order holding her in contempt. There accordingly is no need for this Court to grant certiorari in order to ensure review of the disqualification issue on the merits.

b. Nor does the question of the court of appeals' jurisdiction over the appeal under 28 U.S.C. 1291 warrant review at this time. The decision of the court of appeals in this case is consistent with this Court's decisions in *Cobbledick* v. *United States*, 309 U.S. 323 (1940), and *United States* v. *Ryan*, 402 U.S. 530 (1971), counseling against appellate intervention in grand jury proceedings. As petitioner notes (Pet. 12), there is some division among the circuits regarding the appealability of orders disqualifying counsel in various settings, civil and criminal. However, the Court has granted certiorari in *Flanagan* v. United States, No. 82-374 (Jan. 10, 1983), which raises the question of the appealability of a pretrial order disqualifying counsel in a criminal

case. We do not believe it would be useful for the Court to grant review in another case raising the issue of the appealability of a disqualification order, especially because this case arises in the relatively unique context of an appeal brought only by the lawyer, not his client, and in view of unfolding developments in the district court in this case, explained above (see pages 5-6, *supra*). Cf. *United States* v. *Greger*, 657 F.2d 1109 (9th Cir. 1981), cert. denied, No. 81-1357 (May 2, 1983).[7]

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[7]Of the court of appeals decisions cited by petitioner (Pet. 12), in only one — *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 606 n.10 (D.C. Cir. 1976) — did the attorney appeal a disqualification order. But there the union, whose members the attorney had sought to represent, also appealed, thereby offering some independent assurance in the record of the appeal itself that the clients joined in the appellate challenge.

Petitioner also contends (Pet. 14-16) that the disqualification order was appealable under 28 U.S.C. 1292(a)(1) as an order granting an injunction, even if it was not appealable under 28 U.S.C. 1291 as a "final decision." Petitioner offers no authority for this proposition, and although he made a passing reference to 28 U.S.C. 1292(a)(1) in his mandamus petition in the court of appeals (at 23), that court did not address the applicability of 28 U.S.C. 1292(a)(1). It is significant that the order petitioner characterizes as an "injunction" pertained to the conduct of the proceedings themselves, not independent conduct of the parties. Compare *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981). To accept petitioner's argument would allow circumvention of the finality requirement of 28 U.S.C. 1291 for every order in an on-going case that compels or bars certain conduct in connection with the case, such as a discovery order or an order requiring compliance with a subpoena. Compare *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324-325. Nor does the disqualification order have the requisite "serious, perhaps irreparable, consequence" for appeal to lie under 28 U.S.C.

2. Petitioner also claims (Pet. 22-34) that the court of appeals erred in denying his request for extraordinary relief under 28 U.S.C. 1651. This claim is without merit. This Court has made clear that a writ should issue under that Section "only in extraordinary circumstances" and only where the party seeking relief can show that his right to issuance of the writ is " 'clear and indisputable.' " See, *e.g.*, *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976); *Will* v. *United States*, 389 U.S. 90, 95-98 (1967). Even were this Court now to adopt a far more liberal standard, extraordinary relief would plainly be improper here, because, as shown above (see pages 3-4, *supra*), there can be no doubt that the district court properly disqualified petitioner in the circumstances of this case.[8]

Petitioner contends, however, that the procedures by which the disqualification order was issued were improper. These objections are insubstantial. He complains (Pet. 28-31), for example, that he received inadequate notice concerning his possible disqualification. However, the government had notified petitioner in September 1982 that he was a target of the investigation, and in November 1982, after petitioner had represented one witness before the grand

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1292(a)(1) (*Carson* v. *American Brands, Inc.*, *supra*, 450 U.S. at 84, quoting *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955)), because the clients may challenge the disqualification order under *In re Benjamin* through contempt proceedings, in the same manner as other orders that might have a coercive effect.

[8]Nor is there any merit to petitioner's contention (Pet. 22-23) that the decision here is inconsistent with *In re Taylor*, 567 F.2d 1183, 1187 (2d Cir. 1977), where the court held that the disqualification order was premature because the conflict of interest had not yet ripened. *Taylor* did not involve a conflict between the personal interests of the lawyer and those of his clients, but only potential conflicts of interest among various of the lawyer's clients. In this case, the conflict between petitioner and the witnesses clearly was ripe prior to their actual appearance before the grand jury.

jury, counsel for the government informed petitioner that in government counsel's view, petitioner had a clear conflict of interest and the government would move for his disqualification if necessary. Accordingly, petitioner received ample notice of his possible disqualification.

Petitioner also argues (Pet. 23-24) that the disqualification order was barred by res judicata because another judge of the district court had denied a similar disqualification motion. But as the government explained in the court of appeals, the earlier motion had sought to disqualify petitioner from representing another witness in connection with his release from custody, a matter that Judge Garrity had decided was too remote from the grand jury proceedings to warrant disqualification. See Opposition to Motion for Stay Pending Appeal at 3-4. Here, the disqualification order related to the heart of the grand jury's concerns.[9]

Finally, contrary to petitioner's suggestion (Pet. 25-29), there was nothing improper in the district court's review of the government's motion and *in camera* affidavit prior to the hearing on the motion. This, we presume, would be standard procedure, as part of the court's preparation for the hearing. The fact that the court, on the basis of that review, found disqualification to be clearly appropriate because of petitioner's status as a target likewise is neither surprising nor improper. Petitioner objects to the government's submission of an *in camera* affidavit, but that

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[9]The disqualification motions were assigned to the district court judge in charge of emergency matters at the time the action was filed. This responsibility was rotated from month to month among the district court judges. Consequently, the two disqualification motions, filed at different times, were handled by different judges. This procedure was completely proper. Moreover, contrary to petitioner's contention (Pet. 24-25), even if the assignment of the action did not fully comply with the district court's own rules, this would hardly form the basis for the extraordinary relief of mandamus. Cf. *United States* v. *Caceres*, 440 U.S. 741 (1979).

affidavit merely explained the factual background — drawn from grand jury material — for the government's representation to the court that petitioner is a target of the investigation. It was that target status that furnished the basis for the disqualification, not the supporting documentation. In our view, the court could have ordered disqualification on the basis of the government's representation that petitioner is a target,without review of supporting documentation — at least absent an assertion by petitioner, not made here, that the government's representation of his target status was not bona fide. Cf. *Franks* v. *Delaware*, 438 U.S. 154 (1978). In these circumstances, it plainly was appropriate for the court not to furnish petitioner, as a target of the grand jury investigation, with information relating to that very investigation. To have done otherwise would have afforded petitioner and the other targets whom he represented with an unwarranted means of discovery concerning the grand jury's work. See Fed. R. Crim. P. 6(e). Because petitioner did not challenge his status as a target of the investigation, he was not, in any event, prejudiced by the district court's review of the *in camera* submission substantiating the government's representation to this effect. See App., *infra*, 2a.[10]

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[10]In its March 2, 1983 opinion denying mandamus relief to Daw and Orlandella, the court of appeals observed that in such a "clear cut instance[ ] of conflict," disqualification was appropriate in view of the potential for obstruction of the grand jury proceedings and the interest in avoiding future attacks on the validity of any future indictments, without regard to the contents of the *in camera* submission. Since Daw, Orlandella, and petitioner did not challenge petitioner's target status, the court perceived no way in which Daw and Orlandella were prejudiced by review of that submission (App., *infra*, 2a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1983

DOJ-1983-05

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1107.

IN RE

STELLA ORLANDELLA AND
HAROLD DAW,

Petitioner.

BEFORE COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

MEMORANDUM AND ORDER

Entered March 2, 1983

We find no patent abuse of discretion or other extraordinary circumstances warranting a writ of mandamus to review two district court orders normally reviewable only through contempt proceedings. *In re Oberkoetter*, 612 F.2d 15, 17 (1st Cir. 1978); *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978). First, the district court did not lack jurisdiction, as petitioners contend, to disqualify Mr. Cintolo from serving as their counsel during questioning by the grand jury. Unlike the situation in *In re Taylor*, 567 F.2d 1183, 1187 (2d Cir. 1977), where an attorney representing various witnesses was disqualified before the district court knew whether there would be an actual conflict of interest, here there is no dispute as to the fact that Mr. Cintolo is a target of the grand jury investigation, which by itself puts his

interests in conflict with those of his clients. Thus, the controversy in this case was ripe for judicial adjudication. As to petitioners' claims of lack of notice and of lack of an adequate hearing, we find these to be without merit. Notification through their attorney, then Mr. Cintolo, of the government's request to have him disqualified as their counsel was sufficient notification, and as our records reveal that Mr. Cintolo was made aware of the government's petition, there is no basis for his client's assertion of lack of notice[.] *Link* v. *Wabash R. Co.*, 370 U.S. 626, reh. den. 371 U.S. 873 (1962). Regardless of the propriety, or lack thereof, of the *in camera* review of grand jury materials, as to which we do not express an opinion, we note that the potential for obstruction of the grand jury proceedings coupled with the interest in avoiding future attacks on the validity of grand jury indictments, *see United States* v. *Canessa*, 644 F.2d 61 (1st Cir. 1981), would by themselves justify a disqualification order in such clear cut instances of conflict. Since neither petitioners nor Mr. Cintolo dispute the fact that he was a target of the grand jury investigation, we do not see how they were prejudiced by the *in camera* review of the documents, and consequently, petitioners' lack of hearing claim must fall too.

Petitioners next contend that they have a right to insist on counsel of their own choosing even if there is a conflict, so long as the conflict is explained to them. However, the case law cited for this position is not supportive of it. In *In re Investigation Before Feb. 1977, Lynchberg*, 563 F.2d 652 (4th Cir. 1977), which involved a factual setting strikingly similar to the present one (attorney was target of grand jury investigation), the Fourth Circuit specifically left open the question of informed waiver. "We do not reach the further question of whether the waivers, if executed by witnesses who previously had full knowledge of all of the facts and

legal consequences, might be effective to permit the continued employment of the lawyers", 563 F.2d at 658. Similarly, *In re Taylor* did not address the question of waiver directly, and *United States* v. *Curcio*, 694 F.2d 14 (2d Cir. 1982) dealt with waiver of right to single representation in a criminal trial, not with waiver in the context of a grand jury investigation where the protection of other interests may well warrant a different approach.

The district court's order to compel does not, as petitioners argue, violate their rights under the Fifth Amendment. Nothing in it compels them to testify as to matters that may incriminate them. Their rights under the Fifth Amendment remain and may be exercised.

None of the other arguments raised by petitioners convince us of the necessity or of the wisdom of intervening with the proceedings below at this stage. See *In re Lopreato*, 511 F.2d 1150, 1152 (1st Cir. 1975).

The petition for writ of mandamus, writ of prohibition and injunctive relief is denied.

By the Court:

/s/ DANA H. GALLUP

Clerk.